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CURRENT DEVELOPMENTS

ARBITRATION IN GERMANY

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I. INTRODUCTION

Despite the fact that Germany only has some 80 million inhabitants, the size of German exports ranks third worldwide after China and the U.S., countries with much larger populations. Germany's great focus on exports makes the country automatically closely intertwined with the world economy. As a consequence of the size of German exports and the multitude of economic international relationships of German companies, inevitably commercial disputes are bound to come up. It comes therefore as no surprise that German parties form a large percentage of claimants or respondents in international arbitration proceedings.

While many international contracts to which German corporations are a party stipulate international arbitral institutions outside Germany like the International Chamber of Commerce ("ICC"), London Court of International Arbitration ("LCIA"), and Singapore International Arbitration Centre ("SIAC") as arbitral institutions, there is a noticeable increase in arbitration clauses that stipulate Germany as the venue.

International parties are discovering Germany as a suitable place for arbitration. As this summary will try to show, Germany compares favorably with its international competitors and there are good reasons for considering Germany as a venue for international arbitrations.

II. GERMANY'S LONG ARBITRATION HISTORY

For 130 years, Germany has taken a favorable approach to arbitration. Arbitration was codified in Germany for the first time in 1877 in the 10th Book of the *Zivilprozessordnung* ("ZPO") (Code of Civil Procedure).[1] The guiding principles of this early codification were the respect for far-reaching party autonomy and a minimum of judicial intervention.

While these principles are widely recognized today, at the time when the first German arbitration law entered into force, this favorable attitude toward arbitration was in stark contrast to the skepticism with which arbitration was treated in other legal systems.

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[1] *Zivilprozessordnung* ("ZPO"), Sec. 1025 ff.

III. GERMANY'S ARBITRATION LAW

Although the German arbitration law is compulsory for all arbitral tribunals based in Germany, it provides a mere framework where the parties are free to choose the substantive law as well as the procedural rules and the preferred language of their proceedings.

By and large, this first codification in Germany's Code of Civil Procedure remained essentially unchanged until the revised German arbitration law entered into force on January 1, 1998.

With few exceptions, the provisions of German arbitration law are of a non-mandatory nature. They are default rules which apply only where the parties have not regulated an issue either in their arbitration agreement or by submitting their arbitration to a set of arbitration rules or other rules, such as for instance the International Bar Association ("IBA") Rules on the Taking of Evidence in International Arbitration.

Notwithstanding any international treaties or institutional or other arbitration rules chosen by the parties, the German Arbitration Law is the underlying basis of all domestic and foreign arbitrations, applicable whenever the seat of the arbitration is situated in Germany. In other words, the German Arbitration Law does not distinguish between international and domestic arbitrations and provides a single set of rules for both types of arbitration, with the exception of the rules governing enforcement.

The revised law was drafted with the requirements of the UNCITRAL Model Law in mind and the law is still contained in the 10th Book of the German Code of Civil Procedure (Secs. 1025-1066 ZPO)[2] and applies to institutional as well as to ad hoc arbitrations. To a large extent, the German Arbitration Law is a direct adoption of the UNCITRAL Model Law. For international parties this has the advantage of a high recognition value. By following the UNCITRAL Model Law, Germany provides for modern, liberal and internationally accepted procedural rules.

Germany's Arbitration Law has some minor deviations from the Model Law, including more lenient form requirements for the arbitration agreement;[3] the option to request a ruling from a court on the admissibility of arbitration prior to the constitution of the tribunal;[4] greater powers of state courts to support the appointment of arbitrators[5] and to enforce interim relief;[6] the obligation to apply the law of the country with which the subject matter is most closely connected in the absence of an agreement by the parties on the substantive law;[7] and the time limits for the initiation of annulment proceedings.[8]

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[2] An English translation of the German Arbitration Law is *available at* www.dis-arb.de.
[3] ZPO, Sec. 1031(2).
[4] *Id.* Sec. 1032(2).
[5] *Id.* Sec. 1025(3).
[6] *Id.* Sec. 1041(2).
[7] *Id.* Sec. 1051(2).
[8] *Id.* Sec. 1059(3).

A major difference between the German Arbitration Law and similar laws enacted in countries with a common-law legal system – and a caveat for Anglo-American practitioners – is the fact that "discovery" is practically unknown to German law.

IV. ARBITRATION CONVENTIONS AND INTERNATIONAL TREATIES TO WHICH GERMANY IS A PARTY

Germany has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.[9] Other international conventions that Germany has acceded to include The European Convention on International Commercial Arbitration of April 21, 1961,[10] as well as the Convention on the Settlement of Investment Disputes between States and Nationals of other States of March 18, 1965 ("ICSID Convention")[11] and the Energy Charter Treaty of December 17, 1994.[12] Last but not least, there are more than 130 Bilateral Investment Treaties ("BITs")[13] that contain regulations relevant to arbitration and cross-border enforcement of arbitral awards.

V. ARBITRATION INSTITUTIONS IN GERMANY

The leading non-specialized arbitration institution in Germany is the German Institution of Arbitration (*Deutsche Institution für Schiedsgerichtsbarkeit*—"DIS"). The DIS Arbitration Rules can be found on the DIS website.[14] The DIS shows a continuous increase in the cases it administers: while in 2000 there were just 60 new cases registered, in 2010 there were 155 cases and the positive trend further continues.[15] Roughly one-fifth of all cases at the DIS are conducted in English.[16] The increasing number of cases conducted in English doesn't come as a surprise given that Germany's economy relies heavily on exports. Rules for expedited proceedings were introduced by the DIS as early as 2008.

Even though the German Arbitration Law does not contain any confidentiality provisions, the DIS Arbitration Rules explicitly provide that the parties, the arbitrators and persons at the DIS Secretariat involved in the arbitration are to maintain strict confidentiality towards any third person regarding the conduct of the arbitral proceedings and, in particular, regarding the parties and any forms of evidence.[17]

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[9] *Bundesgesetzblatt* ("BGBL") 1961 II at 121 (Ger.).

[10] BGBL, 1964 II at 425 (Ger.).

[11] BGBL, 1969 II at 369 (Ger.).

[12] BGBL, 1997 II at 4 (Ger.).

[13] *See* UNCTAD, *Full List of Bilateral Investment Agreements*, *available at* http://unctad.org/Sections/dite_pcbb/docs/bits_germany.pdf.

[14] DIS ARBITRATION RULES (July 1, 1998), *available at* http://www.dis-arb.de/en.

[15] http://www.dis-arb.de/en/39/content/statistics-id54.

[16] For more statistical information, *see* http://www.dis-arb.de/en/39/content/statistics-id54.

[17] DIS ARBITRATION RULES, Sec. 43(1).

The DIS also serves as the competent authority for the duties of the ICC in Germany, regularly acts as the appointing authority for ad hoc proceedings, and provides general advice on the selection of arbitrators.

The DIS provides effective and speedy dispute resolution, with many cases completed in 12 to 18 months from the date of filing, and at reasonable rates.

In addition to the DIS, there are a number of other specialized arbitration institutions in Germany. To name but a few: The German Maritime Arbitration Association ("GMAA"),[18] the Chinese European Arbitration Centre ("CEAC"),[19] and the Frankfurt International Arbitration Centre ("FIAC"),[20] among other specialized arbitration institutions.[21]

VI. AD HOC ARBITRATIONS IN GERMANY

The German Arbitration Law provides a legal fall-back position for ad hoc arbitrations in various provisions regarding the powers of the arbitral tribunal (ZPO, Sec. 1042(4), sentence 1), the place of arbitration (ZPO, Sec. 1043(1)), the language of the proceedings (ZPO, Sec. 1045) as well as the governing law (ZPO, Sec. 1051).

VII. PROCEDURAL ASPECTS OF ARBITRATION IN GERMANY

According to Section 1032(2) of the ZPO, a party may, prior to the constitution of the tribunal, i.e. until the last arbitrator has been appointed, apply to the courts to determine the admissibility or non-admissibility of arbitral proceedings.

The limits imposed by the few existing mandatory provisions are intended to ensure that the basic requirements of due process are fulfilled. The guiding principle of arbitration proceedings in Germany is laid down in Section 1042(1) of the ZPO, which states that the parties in arbitration proceedings shall be treated with equality and each party shall be given an effective and fair hearing.

The parties may freely determine all other procedural rules, such as the commencement of the arbitral proceedings (ZPO, Sec. 1044), the language of the proceedings (ZPO, Sec. 1045), time limits for the statements of claim and defense (ZPO, Sec. 1046), whether an oral hearing shall take place or the proceedings shall be on a documents only basis (ZPO, Sec. 1047), the effect of a default of one party (ZPO, Sec. 1048), and the appointment of experts (ZPO, Sec. 1049).

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[18] http://www.gmaa.de.

[19] http://www.ceac-arbitration.com.

[20] http://www.frankfurt-main.ihk.de/english/legal_matters/disputeregulation/index.html.

[21] *E.g.*: Court of Arbitration of the German Coffee Association, http://www.hk24.de/recht_und_steuern/schiedsgerichtemediationschlichtung/Schiedsgericht/schiedsgericht_kaffeeverband/schiedsgerichtsordnung/364038/schiedsgerichtsordnung_index.html; Hamburg Friendly Arbitration, http://www.hk24.de/en/fairplay/arbitration/347708/arbitration2.html.

In addition, the law to be applied to the merits as well as to the arbitration agreement itself may be determined by the parties (ZPO, Sec. 1051). Furthermore, the parties may determine the court that has jurisdiction for the various supportive and supervisory actions either by a specific forum selection clause or by determining the place of arbitration (ZPO, Sec. 1062(1)).

The German Arbitration Law contains several provisions to prevent parties or party-appointed arbitrators from successfully engaging in delaying tactics or obstructive behavior. Firstly, the various fall-back provisions contained in Sections 1034-1039 of the ZPO ensure that the arbitral tribunal may be constituted despite a party's failure to cooperate or take the necessary steps in the appointment proceedings. The required appointments will then be made by the courts, not only in cases where the place of arbitration is in Germany, but also in cases where it has not yet been fixed. Moreover, Section 1048 of the ZPO explicitly provides for default proceedings where one party does not take the necessary steps in the arbitral proceedings.

As stated already above, while the German Arbitration Law does not address the question of confidentiality, it is widely accepted that arbitrators are under an implied duty of confidentiality. Various rules of German arbitrations institution make an explicit reference to confidentiality.[22]

It is generally accepted in view of Section 1040(1) of the ZPO that arbitrators may decide on their own jurisdiction under the doctrine of competence-competence, the exercise of which can be challenged before a state court.

The various IBA Rules (on Conflict of Interest; Taking of Evidence) are not part of German Arbitration Law, but are widely followed and have also influenced German case law.

With regard to disclosure and discovery, German practitioners take a comparatively restrictive approach. This is because of the general principle of German procedural law that each party must gather the evidence necessary to fully substantiate its respective claims and defenses and that the opposing party is not obliged to assist or otherwise participate in that process. However, the approach taken in international arbitration proceedings is somewhat more liberal.

Regarding the appointment of expert witnesses there is another difference compared to arbitral proceedings in common-law jurisdictions: the default regulation under German Arbitration Law is to rely on tribunal-appointed rather than party-appointed expert witnesses. Nevertheless, parties frequently appoint their own experts as well.

German law does not provide for any punitive or exemplary damages. If a German award contained any such punitive damages, this would be a reason to have the award set aside by the German courts.

As to the costs of the proceedings, under German law the general rule is that "costs follow the event." Thus, costs are awarded at the tribunal's discretion, taking into account the circumstances of the case and ultimately the outcome of the proceedings.

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[22] *E.g.*, DIS ARBITRATION RULES, Sec. 43

Another aspect that comes often as a surprise to arbitration practitioners with a common-law background is the active role that arbitral tribunals take with regard to settlements in Germany.

As an example, DIS Arbitration Rules, Sec. 32(1) provides:

> At every stage of the proceedings, the arbitral tribunal should seek to encourage an amicable settlement of the dispute or of individual issues in dispute.

German arbitration follows the inquisitorial system rather than the adversarial system. Thus, it is the arbitrator who actively leads the proceedings, by directing the course of the debate, by asking questions, by referring the parties to particular factual aspects or to particular legal aspects (for instance even to such aspects which a party might have overlooked, but which, in the arbitrator's opinion, could be relevant for deciding the dispute).

VIII. THE ATTITUDE OF GERMAN COURTS TOWARDS ARBITRATION

German courts are arbitration-friendly and can be relied upon to uphold, recognize and enforce awards where requested to do so. Whenever it is clear that the parties have agreed on arbitration, courts will try to uphold the parties' agreement despite any defects. German courts recognize and enforce arbitral awards and protect the principle of the finality of the arbitral award.[23] This is underlined by the fact that German courts have specialized commercial chambers.

German law provides for very limited review of arbitral awards. Section 1026 of the ZPO expressly limits the extent of court intervention to the instances regulated in the 10th Book of the Code of Civil Procedure. There is no inherent jurisdiction of the courts to supervise the arbitral proceedings or even their outcome. No review of an award on the merits is possible and German courts have been very cautious in making use of the few supervisory powers granted to them.

Grounds for review include lack of capacity of a party, invalidity of the arbitration agreement, violation of due process principles, ultra vires decisions and an improper constitution of the arbitral tribunal, invalidity of the arbitration agreement, and thus, the lack of jurisdiction of the arbitral tribunal (ZPO, Sec. 1059(2)).

Section 1063(3) of the ZPO allows an enforcing party to make an application to secure or freeze the German assets of the losing party up to the value of the arbitral award, prior to official service of the award. The winning party only needs to show that the award debtor has assets in Germany, in particular bank accounts that could be easily transferred out of the jurisdiction,

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[23] Oberlandesgericht (OLG) (Higher Regional Court) Muenchen, Nov. 14 2011, Zeitschrift für Schiedsverfahren (SchiedsVZ) 43, 2011, summary in English also *available at* http://www.newyorkconvention1958.org/index.php?lvl=author_see&id=145; Oberlandesgericht (OLG) (Higher Regional Court) des Landes Sachsen-Anhalt, Mar. 4 2011, Zeitschrift für Schiedsverfahren (SchiedsVZ) 228, 2011.

and that the creditor knows of no other immovable assets in Germany that could be used to satisfy the award.[24]

IX. COURTS RECOGNIZE AND SUPPORT PARTY AUTONOMY IN ARBITRATION

German courts are strong supporters of party autonomy in arbitration.[25]

Furthermore, the various court proceedings in support of and in supervision of the arbitral proceedings are regulated in a way to ensure that they are conducted in a fast and efficient manner. Pursuant to Section 1062 of the ZPO, the jurisdiction for nearly all arbitration-related proceedings is concentrated at the Higher Regional Courts (*Oberlandesgericht*— "OLG"); most Federal States (*Bundesländer*) have assigned one senate at a particular Higher Regional Court to deal with these matters.

X. CONCLUSION

As a leading export nation and Europe's leading economy, Germany is an important commercial center with a modern and efficient infrastructure and is easily accessible by air, high-speed rail, etc. Germany has a long-standing tradition as an arbitration-friendly jurisdiction and provides for modern, liberal and internationally accepted arbitration rules. Nowadays Germany is not only among the major users of arbitration, in recent years, Germany has also become an increasingly popular location for international arbitration proceedings.

The German legal system is based on codifications which enable swift and straightforward access to the law by providing a systematic and transparent legal framework for all legal issues. General features of German arbitration are the principle of territoriality, the prevailing role of party autonomy, the guarantee of due process and effective proceedings and the limitation of court interference. Germany's Arbitration Law offers an efficient and up-to-date legal framework and a neutral and impartial judiciary at the highest level for international arbitration proceedings.

In addition to having a modern law, Germany also has an experienced and arbitration-friendly court system. Arbitration matters are allocated to a specialized section of the higher courts, thereby guaranteeing expert judges for arbitration matters. German courts have very restrictive annulment practices, resulting in a high legal certainty for the parties.

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[24] *See* Oberlandesgericht (OLG) (Higher Regional Court) Frankfurt am Main, Nov. 23, 2009, Zeitschrift für Schiedsverfahren (SchiedsVZ) 227, 2010; for a summary in English, *see* Carsten Grau & Vanessa Blechschmidt, *German courts rule on preliminary enforceability of foreign arbitral awards*, http://www.arbitration-adr.org/documents/?i=199.

[25] *See* Oberlandesgericht (OLG) (Higher Regional Court) Muenchen, July 23, 2012, Zeitschrift für Schiedsverfahren (SchiedsVZ) 282, 2012.

Arbitration in Germany is reliable, consistent and without any "surprises" for non-German parties who are otherwise unfamiliar with German law. This is reflected in the existing and very effective arbitration infrastructure.

Such factors make arbitration in Germany an attractive option not only for domestic but also for international parties who are looking for a reliable and neutral jurisdiction for their arbitral proceedings.